IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

APPEAL FROM ORDER NO. 825 OF 2005

Jivraj Ugamshi Revar .. Appellant

vs

Ugamshi Jairam Revar & ors .. Respondents

Mr.K.S.Dewal for Appellant

Mr.T.D.Singh for Respondent no.1

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CORAM : B.H.MARLAPALLE, J

DATE: 28th September, 2005

P.C.

1. This appeal has been filed by the defendant no.1 in S.C.Suit No. 825 of 2004 being aggrieved by the order dated 30th June, 2005 passed by the learned Judge of the City Civil Court, Mumbai allowing the Notice of Motion No..1125 of 2004. By the said order the defendant no. 1 has been restrained from acting upon the Deed of Gift

registered with the Sub-Registrar of Assurances, at Andheri on 16th October, 2003 and/or attempting to do any act prejudicial to the rights and title of the plaintiff pursuant to the said Gift Deed. Whereas the defendant no. 2 the cooperative housing society in which the suit flat is located has been restrained from taking any further steps pursuant to the said Gift Deed until disposal of the suit.

2. The plaintiff is father and the defendant no.1 is the son there is no dispute that by the registered Gift Deed dated 16th October, 2003 flat No.373, Building No.14 Bharadwaj Cooperative Housing Society, New MIG Colony, Bandra (E) Mumbai has been sought to be transferred by the father to the son and as at present the said flat is presently occupied by the father. In the written statement filed by the defendant no.1 the jurisdiction of the City Civil Court to entertain the suit has been challenged on two grounds namely (a) pecuniary jurisdiction and (b) dispute between the parties being the issue touching upon the management and business of the defendant no.2 Cooperative Housing Society. However, the

defendant no. 1 did not file a separate application for framing and deciding these preliminary issues before the notice of motion was allowed. Section 9A (2) of the Code of Civil Procedure does permit the trial court to grant ad interim order of injunction pending decision on the preliminary issues regarding the jurisdiction but an application for temporary injunction cannot be decided unless such issues are adjudicated upon as per the scheme of section 9A (1) of the Code of Civil Procedure. It has also been noted that the Notice of Motion has been disposed of before the defendant no. 2 filed its reply and second part of the injunction order operates against the said defendant no.2. The approach of the trial court does not appear to be in consonance with the well settled legal position in deciding Notice of Motion No.1125 of 2004 finally and we may usefully refer in this regard to the Division Bench decision of this court in the case of Meher Singh vs Deepak Sawhny & anr reported in 1998 (3) MhLJ 940 and also another Division Bench decision in the case of Smithkline B3eecham Consumer Healthcare GMBH vs Hindusthan Lever & anr reported in 2003 Vol. 105 (2) B.L.R.547.

3. Learned counsel for the defendants states that he will file a separate application before the trial court in S.C.Suit No.825 of 2004 raising the issue of preliminary jurisdiction on both counts as referred to hereinabove within a period of 2 weeks from today and also undertakes on taking instructions from the defendant no. 1 who is present in court that during the pendency of the suit the defendant no. 1 son shall not take any steps either personally or through any of his family members, agents, friends so as to disturtb the plaintiff’s possession over the suit land as at present.

4. Appeal is hereby disposed of by noting the said undertaking and with directions to the trial Court to decide the application on the preliminary point of jurisdiction after hearing both the parties and as expeditiously as possible but preferably within a period of 3 months and in the meanwhile clause 1 of the impugned order shall stand stayed.

This order is without prejudice to the rights and contentions of the parties.

(B.H.Marlapalle, J)